In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1778

WILLIAM H. RODGERS, JR., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 25-41) is reported at 492 F. 2d 228. The opinion of the district court (Pet. App. 42-43) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on February 25, 1974. The petition for a writ of certiorari was filed on May 28, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a decision by the Federal Trade Commission not to institute an investigation under Section 5 of the Federal Trade Commission Act is subject to judicial review.

2. Whether, if such a decision is subject to judicial review, the Commission abused its discretion in declining to investigate statements and activities of manufacturers and chain store operators during an election campaign to defeat an initiative proposal in the State of Washington to prohibit the sale of soft drinks and beer in no-deposit containers.

STATUTES INVOLVED

Section 5(a)(1) of the Federal Trade Commission Act, as amended, 15 U.S.C. 45(a)(1), and Section 1 of the Sherman Anti-Trust Act, as amended, 15 U.S.C. 1, are set forth at Pet. App. 52-54.

STATEMENT

On December 11, 1970, petitioner sent a letter to the Federal Trade Commission requesting that the Commission initiate an investigation of "unfair and deceptive practices in commerce arising out of [an] * * * initiative campaign in the State of Washington" (R. 34).[1] The initiative proposal, which a majority of the voters had rejected in the November 1970 statewide election, would have prohibited the sale of beer and soft drinks in containers not having a refund value of at least five cents.

The letter alleged that "grocery chain stores and the manufacturers of beer and soft drinks combined, in both vertical and horizontal agreements, to make price representations to the public that constituted unfair and deceptive trade practices" (R. 35). The letter focused on representations that adoption of the initiative would increase consumer prices: *e.g.*, "50 per cent higher prices for beer, soft drinks"; "will add 48 cents per six pack" (R. 34). It characterized these statements as "a joint

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[1] "R." refers to the record in the court of appeals.

price move" in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 (R. 35). Alternatively, petitioner contended that, "[i]f there was no agreement, then the representation [regarding the price increase] was false and unlawful on that separate ground" (*ibid.*).

The letter requested that the Commission (1) institute both investigative and adjudicative proceedings against each manufacturer and chain store which conspired to fix prices during the campaign, (2) issue a cease-and-desist order against future violations, and (3) require each violator to admit publicly in commercial advertisements that it had been found guilty of deceptive practices during the campaign (*ibid.*).

In a letter dated January 26, 1971 (Pet. App. 44-51), the Secretary of the Commission advised petitioner that it is "our view that action on your complaint under Section 5 of the FTC Act is not warranted" (*id.* at 50-51). The Secretary stated that the proscriptions of Section 5 of the Federal Trade Commission Act "are tailored for the business world, not for the political arena" (*id.* at 47). The letter also stated that, under this Court's decision in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, "[n]o violation of the Sherman Act can be predicated upon group efforts to influence the passage or executive enforcement of laws. * * * We believe this rule also obtains with respect to Section 5 of the FTC Act" (*id.* at 50).

Petitioner then filed a complaint (R. 1-6) in the United States District Court for the Western District of Washington seeking injunctive and declaratory relief that would require the Commission to initiate an investigation. The complaint also asked the court to declare that the practices described in petitioner's allega-

tions to the Commission violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2 (R.6).

On the Commission's motion, the district court dismissed the complaint (Pet. App. 42-43). The court held that the decision whether to initiate an investigation is "committed to the discretion of the Federal Trade Commission" and that "the action is barred" by this Court's decision in *Noerr Motor Freight*, *supra* (*ibid.*).

The court of appeals affirmed (Pet. App. 25-41). It assumed "without deciding" that the Commission's decision is reviewable under the Administrative Procedure Act, 5 U.S.C. 701-706 (*id.* at 28), and it held that the decision was not "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" within the meaning of 5 U.S.C. 706(2)(A) (*id.* at 36). The court concluded that the Commission's decision is consistent with the *Noerr* decision and that the activities described in petitioner's allegations would not be covered by the "sham" exception to the *Noerr* rule (*id.* at 35).

ARGUMENT

The decision of the court of appeals is correct, and there is no reason for further review.

1. Although the court of appeals found it unnecessary to decide the issue, the district court was correct in concluding that the Commission's decision is not subject to judicial review. The Federal Trade Commission Act does not permit private parties to initiate Section 5 proceedings. Section 5(b) authorizes the Commission to issue a

complaint under Section 5 "if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public" (45 U.S.C. 45(b)).

In *Federal Trade Commission* v. *Klesner*, 280 U.S. 19, 25, this Court stated:

> A person who deems himself aggrieved by the use of an unfair method of competition is not given the right to institute before the Commission a complaint against the alleged wrongdoer. Nor may the Commission authorize him to do so. *He may of course bring the matter to the Commission's attention and request it to file a complaint. But a denial of his request is final.* [Footnote omitted, emphasis added.]

2. The Commission did not abuse its discretion in declining to initiate an investigation. Even if Section 5 permits the Commission in some circumstances to examine misrepresentations or other practices in state initiative campaigns, the Commission has broad discretion in deciding what practices it should investigate. Policing state elections is not a normal part of the Commission's activities, and the agency was justified in declining to assume that role in this case.

Moreover, it is unlikely that the practices described in petitioner's letter were unfair or deceptive acts or practices in *commerce*. The same considerations which led this Court to hold that the Sherman Act does not prohibit group solicitation of governmental action are applicable to Section 5 of the Federal Trade Commission Act.[2]

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[2]Although petitioner sought a declaratory judgment with respect to the legality of the alleged practices under the Sherman Act, that request was inappropriate. The Commission does not enforce the Sherman Act as such, and the persons who allegedly committed the practices in question were not named as parties to the suit.

In the *Noerr* case, this Court stated (365 U.S. at 141; footnote omitted):

> The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena. Congress has traditionally exercised extreme caution in legislating political activites, a caution which has been reflected in the decisions of this Court interpreting such legislation. All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be termed unethical.

Contrary to petitioner's claims, the decision below does not conflict with decisions holding that the *Noerr* rule is inapplicable to certain activities which violate the Sherman Act. The court of appeals correctly concluded that the activities described in petitioner's letter to the Commission are not analogous to the activities involved in those cases.

Petitioner contends (Pet. 9-19) that this case falls outside *Noerr* because Washington laws governing campaign contributions were violated. The court of appeals correctly held, however, that the material submitted to the Commission "fails to disclose any direct charge of violation of Washington State law and no facts were submitted to the Commission which would support any charge of illegality" (Pet. App. 36).

Petitioner also contends (Pet. 19-21) that this case falls within the so-called "sham" exception in *Noerr* (365 U.S. at 144). However, petitioner's allegations do not show any abuse of administrative or judicial processes of the type alleged in *California Motor Transport*

Co. v. *Trucking Unlimited*, 404 U.S. 508. See also *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, judgment on remand affirmed, No. 73-777, decided May 28, 1974. Allegations of misrepresentations in election campaigns present a very different problem. In *California Motor Transport* this Court observed: "Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process" (404 U.S. at 513).

Petitioner now states that his claim was that statements concerning expected increases in consumer prices were a screen for the implementation of an illegal price-fixing scheme. As the court of appeals concluded, however, "the materials brought to the attention of the Commission did not indicate that the opponents of Initiative 256 had acted primarily to attain anti-competitive goals" (Pet. App. 41).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1974.